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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of CHRISTOPHER and CLAIRE MILLS.	
CHRISTOPHER MILLS, Appellant, v. CLAIRE MILLS, Respondent.	F043363 (Super. Ct. No. CV31267) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. William C. Polley, Judge.

Law Office of Steven G. Mikelich, Inc., and Steven G. Mikelich for Appellant.

Law Offices of Bernard N. Wolf, Bernard N. Wolfe; Law Offices of Joanne Shulman and Joanne Schulman for Respondent.

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Christopher Mills appeals from the denial of his motion to terminate his spousal support obligation to his former wife, Claire Mills. Christopher argued in support of the motion, notwithstanding his relatively greater income and her relatively greater need, that enough time had passed since their divorce for Claire to become self-supporting, and her

failure to do so was due to lack of interest and effort. The court imputed income to Claire as if she were working full-time, and reduced Christopher's spousal support accordingly, but declined to terminate it altogether. Christopher claims the court abused its discretion. We disagree and will affirm the order.[1]

FACTS AND PROCEEDINGS

Christopher and Claire had been married nearly 20 years when Christopher filed for dissolution on December 29, 1989. Christopher, a physician, and Claire, a nurse practitioner, shared a medical practice in Sonora owned by Christopher R. Mills, M.D., Inc. (Mills Inc.). Christopher also worked at two other clinics: one in Stockton and one in Modesto. As best we can tell, both clinics were operated by the Family Planning Associates Medical Group (FPA), which was paying Mills Inc. $9,000 a month for Christopher's services. It also appears that FPA was making an "annual compensation payment" to Mills Inc., in addition to the monthly payments, pursuant to a "1981 buy-sell agreement." The annual payments were $60,000, or the equivalent of $5,000 a month. Mills Inc., in turn, paid the sum of these two amounts ($14,000 a month) to Christopher as part of his monthly salary. He also evidently received a salary for his work in Sonora.

The 1990 Temporary Support Order

Claire filed a motion for spousal support (among other things) on April 11, 1990. The matter came to a hearing on June 28, followed by a written statement of decision on August 22 in which the court found that the Mills's marital standard of living in the three years preceding their separation had been $18,180 per month (plus other benefits such as health insurance and professional education expenses paid by the medical practice); that

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[1] We refer to the parties by their first names both to make our opinion easier to read and to humanize it somewhat. We intend no disrespect. (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 475-476, fn. 1.)

Christopher's earnings totaled $21,614 per month; that Claire's salary at the Sonora practice was $4,167 per month; that this was at the top of the salary range for someone with Claire's training and experience; that Christopher was just completing his medical training when he and Claire were married; and that Claire had actively participated with Christopher in building his medical practice. On this basis, the court directed Christopher to pay Claire $4,749 a month in spousal support beginning July 1, 1990, "and continuing until further order of the court or until [Claire] removes herself from the [Sonora practice] and thus is no longer entitled to receive her usual salary from [Mills Inc.]." Support was to increase to $6,408 a month once Claire left the practice.

The court's August 22, 1990 order also directed the parties to appear at a hearing on September 10 to determine whether, and under what circumstances, Claire should be required to move her practice out of the Sonora office of Mills Inc. Following the hearing, the court ordered Claire to leave within 30 days, subject to Christopher having paid her $50,000 in cash toward her relocation expenses at least 15 days in advance of the move. It appears both parties complied with this order.

The 1993 Permanent Support Order

On January 11, 1993, the court entered a judgment implementing an agreement reached by the parties regarding spousal support and the division of community property. Generally speaking, Christopher was to retain his medical practice and the other assets of Mills Inc. (which was community property). Claire, in addition to her medical practice, received the family home (subject to existing encumbrances), a half interest in the Mills Inc. pension and profit-sharing plan, and a $300,000 equalization payment. The payment was to be made in monthly installments of $1,490 for five years, beginning June 1, 1992; in annual payments of $10,000 for four years, beginning June 1, 1993; and in a lump-sum payment of $172,950 payable on June 1, 1997.

Spousal support was to take three forms. First, Christopher was directed to pay Claire $4,100 a month (roughly the equivalent of her former salary at the Sonora office),

beginning June 1, 1992 and continuing thereafter until further order of the court. "Said sum shall be non-taxable to [Claire] and non-deductible to [Christopher]." The order also provided that neither the amount nor the duration of these payments could be modified during the next five years (ending June 30, 1997), and only then upon a properly noticed motion and a showing of changed circumstances. (Support order No. 1.)

(Christopher was also ordered to pay Claire $19,530 in past-due temporary spousal support payments, including interest.)

Second, Claire's one-half interest in the annual payments from FPA to Mills Inc. was to be treated as a form of spousal support, as if "paid from tax deductible payroll funds received by [Christopher] from his Sonora [practice]." This part of the order could not be modified for any reason, either before or after the five-year period. (Support order No. 2.)

Third, Christopher was required to pay Claire an additional $2,643 a month in "taxable spousal support" for five years beginning June 1, 1992. "This spousal support is deductible by [Christopher] and includable by [Claire]." (Support order No. 3.)

The court agreed to make written findings of fact within 60 days, "pursuant to Civil Code section 4801" (see now Family Code section 4330 et seq.),[2] in support of its spousal support orders.

On May 21, 1993, the parties submitted, and the court adopted, stipulated findings of fact that were incorporated into the permanent support order. These findings, in turn, referred back to the court's findings made in connection with the temporary support order in 1990. The court found the Mills's marital standard of living in 1989 had been $24,456 a month (based on the year immediately preceding their separation), rather than $18,180 as found in the temporary order (based on the average of the three preceding years). The

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[2] Statutory references are to the Family Code unless otherwise indicated.

court found as well that Christopher had been working less at the Stockton and Modesto clinics since the separation; that as a result his earnings had fallen significantly between 1989 and 1992; and that Claire, other than spousal support, had no income at all in 1992 because the medical practice she started in December of 1990 was losing money. These findings did not cause the court to alter the amount or duration of Christopher's support obligation (although the support order was subsequently modified in some other respects that do not concern us here).

Christopher's 1997 Motion to Modify Support

As we have said, Christopher's obligation under support order No. 2 above could not be modified, and his obligation under order No. 3 expired by its own terms in June of 1997. On August 1, 1997, Christopher filed a motion to terminate or substantially reduce his obligation under support order No. 1 (incorrectly identified in the petition as order No. 3) on the ground he had little money left for himself after meeting his various obligations to Claire.

> "What has been happening in the years since 1992 is that Claire Mills has been enjoying practice as [a] nurse practitioner. She has been able to take time off, vacations, trips to Europe, and that sort of thing, while I have been struggling to make ends meet by borrowing money and relying upon other people to support me. [¶] The time has come for Claire Mills to stand on her own and support herself."

An evidentiary hearing followed on March 25 and 27, 1998. The court issued an order on July 13 reducing Christopher's spousal support to $3,519 a month retroactively to the date of the petition, and to $2,500 a month beginning January 1, 1999. This was based on the court's findings that Christopher had met his burden of proving a substantial reduction in his income and ability to pay spousal support.

Claire objected to the order on several grounds, including the court's failure to issue a tentative decision and/or a statement of decision. (See Code Civ. Proc., § 632; Cal. Rules of Court, rule 232.) The court failed to respond to these latter objections, and

Claire appealed. We reversed and remanded. (*In re Marriage of Mills* (Dec. 16, 1999, F031690) [nonpub. opn.].)[3]

Following remand, the court issued a proposed statement of decision on March 31, 2000 (ruling on Christopher's 1997 motion). The court said its previous order reducing Christopher's spousal support (the order we just reversed) had been based on inaccurate information about Christopher's income. The court found that, contrary to Christopher's testimony at the March 1998 support hearing, the evidence "clearly" demonstrated that his gross annual income had increased from $104,606 in 1992 to $181,094 in 1997. The court therefore found Christopher had failed to satisfy his burden to show "a substantial reduction in his income and his ability to pay support."

As for Claire's financial situation, the court found that her income was limited to the $4,100 she received every month in spousal support, plus about $2,000 a month from investments; that her expenses to maintain the marital standard of living were $9,703 a month; and that Christopher therefore had failed to meet his burden to show her income was sufficient to cover her needs. More importantly, the court found Claire had made a reasonable effort to establish herself in business as a nurse practitioner.

> " … The court finds that [Claire] has worked diligently to generate income as a nurse practitioner. Had the court not heard or seen the evidence in this case, [it] would not have believed that a nurse practitioner with her experience and reputation could practice full time for eight years and not generate any net income to herself. That is, however, what the evidence shows.
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> "The clear policy of the law in this state as set forth in Family Code section 4320 k [see now section 4320, subd. (*l*)[4]] is that petitioner [*sic*]

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[3] We take judicial notice of the record in the previous appeal. (Evid. Code, § 459.)

[4] Section 4320 was enacted in 1992, effective January 1, 1994, and incorporates the provisions of former Civil Code section 4801. What is now subdivision (k) was added in

become self-supporting within a reasonable time. The court declines to impute an income to [Claire] from her practice at this time. The court expects that [Claire] will not continue to work for nothing indefinitely. Pursuant to *In re Marriage of Gavron*[] (1988) 203 [Cal.App.3d] 705,[5]

1996, and the reference in that subdivision to section 4336 was added in 1999. Section 4320 now provides in part:

> "In ordering spousal support under this part, the court shall consider all of the following circumstances: [¶] … [¶]
>
> "(*l*) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a 'reasonable period of time' for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court's discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties."

Section 4336 was also enacted effective January 1, 1994, and replaces provisions in former Civil Code section 4801. It states in part:

> "(a) Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely in a proceeding for dissolution of marriage or for legal separation of the parties where the marriage is of long duration.
>
> "(b) For the purpose of retaining jurisdiction, there is a presumption affecting the burden of producing evidence that a marriage of 10 years or more, from the date of marriage to the date of separation, is a marriage of long duration.…
>
> "(c) Nothing in this section limits the court's discretion to terminate spousal support in later proceedings on a showing of changed circumstances.
>
> "(d) This section applies to the following: [¶] (1) A proceeding filed on or after January 1, 1988. [¶] …"

5 In *In re Marriage of Gavron*, *supra*, 203 Cal.App.3d at pages 711-712, the court held a supported spouse cannot be held to an expectation of self-sufficiency, i.e., the court may not shift the burden to the supported spouse to demonstrate a continued need

> [Claire] is put on notice that the court will consider imputing to her the usual earnings of a nurse practitioner in this area if she does not become fully self-supporting by the end of the five-year period … she testified [at the March, 1998 hearing it usually takes a medical corporation to become profitable]. The court expects that [within the next three years] she will be making at least as much as she could earn working for someone else …."

In an order filed on June 26, 2000, the court adopted this proposed statement of decision as its final decision, and denied Christopher's 1997 motion to modify support accordingly. Christopher appealed from this decision, but the appeal was dismissed on February 5, 2001.

Christopher's 1999 Motion to Modify Support

On April 1, 1999, while the appeal from the 1998 support order was still pending, Christopher filed another motion asking the court, among other things, "to have spousal support set to zero and terminated" on the ground that there had been a "further change of circumstances" since the earlier order.[6] It is this motion that would become, more than five years later, the subject of the present appeal.

The motion stated Christopher's claim as follows.

> "[Christopher] asserts that [Claire] has not made a good faith effort to become self sufficient and to earn a living wage and that since [the previous support hearing in] March of 1998 she has done nothing in order to contribute her fair share to keep the marital lifestyle that she enjoyed in the final years of the marriage.
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> "[Christopher] asserts that [Claire] if she has taken [*sic*] the necessary and appropriate steps in her nurse practitioner practice should be making as a salary approximately $50,000 to $60,000 a year which should

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for support, unless he or she has been made aware of that expectation in a previous support order.

[6] The parties' subsequent pleadings, and the court's decision, refer to Christopher's motion to modify support made on August 3, 1999. We can find no motion with that date in the record. There was such a motion filed on April 1, 1999, however.

be utilized as a factor in eliminating, terminating, or substantially be reducing [*sic*] the spousal support burden on [Christopher].

"If [Claire] is not making $50,000 to $60,000 a year, then such sums should be imputed to [her] as the reasonable income that a nurse practitioner would make working for a hospital, a medical doctor, or in the type of nurse practitioner practice as run by [Claire]."

A hearing on the motion, first set for May 10, 1999, was continued several times before finally being held two and a half years later, on November 7 and 8, 2001. In the interim, on June 26, 2000 (the same day the court denied his earlier motion), Christopher filed an income and expense declaration reporting his gross income in the previous 12 months had been $245,671, or $20,473 a month, which, less payroll deductions, left him with a net monthly disposable income of $11,910.

On July 13, 2000, Claire moved to dismiss Christopher's support motion on two grounds. She argued he should be barred from bringing the motion under the doctrine of "unclean hands" because he owed her more than $60,000 in support arrearages, attorney fees, and court costs from the previous motion. And she maintained Christopher had failed to justify the motion by showing a change of circumstances. In fact, she asserted Christopher's income actually had increased, on which basis she claimed she was entitled to greater support.

Claire also stated she had incurred additional expenses to respond to an IRS audit of her federal tax return, it being the result of Christopher having claimed a deduction for the money he paid her pursuant to support order No. 1 of the 1993 permanent support order (which had expressly made the support payments nondeductible).

The next day, July 14, 2000, Christopher moved to amend his still-pending 1999 support motion in view of our decision in his first appeal and the trial court's "change of position," i.e., its order denying his 1997 support motion. He said:

"[Christopher] prays that spousal support be reduced or set at zero in this case. In broad terms, [he] asserts that his actual standard of living, based on his income, is not equal to the marital standard of living. Further,

> even though his income shows higher amounts than when married, after deduction for expenses, both business and personal, the actual standard of living is below the marital standard enjoyed by both parties in 1989.
>
> "Further, [Claire] has not exercised appropriate due diligence in seeking and maintaining employed [*sic*] geared and keyed to financial independence and financial self-sufficiency. [She] has squandered the education, experience, and practice that she garnered in the marriage. She has mismanaged the valuable assets given to her. Factoring these matters reduces [her] need …."

On August 9, 2000, Christopher filed a response to Claire's motion to dismiss his support motion. Claire, in turn, filed a trial brief in opposition to Christopher's motion to amend his support motion.

At a hearing on August 21, 2000, the court granted Christopher's motion to amend but otherwise continued the matter of spousal support subject to a resolution of his appeal from the previous support order (and subject to his payment of $23,588 for Claire's costs and attorney fees incurred in the earlier proceedings).

The hearing was continued several more times, until November 7 and 8, 2001. In his trial brief, Christopher conceded his income had increased to nearly $24,000 a month; that Claire's income, although she had started to earn a small profit from her practice, was still insufficient to meet her needs; that this disparity between their incomes was likely to continue forever; and therefore so too was his spousal support obligation as long as it was calculated using a purely "mechanistic approach" based on relative income and need.

Alternatively, Christopher argued on the strength of *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801 (*Schaffer*), that the court should exercise its equitable powers to terminate support in recognition that "[i]f [Claire] is not independent yet based upon all the advantages … she has had, then it is her own choice and it is her own damn fault." The court should consider the entire history of the case, he maintained, and should not "deliberately blinker [itself] to the myopic syllogism based on just a narrow cross section

of facts" that have occurred since the last support order. This was not a case that should be decided based on income and need, he said, nor by simply imputing income to Claire. "Claire will always never make money. It is part of her game. She has played this game since 1990, and she continues to play the game. Claire will not lose her addiction to spousal support. She will have to be weaned 'cold turkey.'"

Claire also filed a trial brief. She argued relative income and need were indeed the determinative factors in this case, and Christopher's "unclean hands"-- his unpaid support and his actions leading to the IRS audits -- should preclude him from invoking the court's equitable powers.

The two-day hearing in November of 2001 was taken up largely by the testimony of several witnesses, including both Christopher and Claire, about the employment and business opportunities in and around Tuolumne County for a nurse or nurse practitioner with, or without, a specialty in women's health. Suffice it to say there was no consensus as to whether it would be possible for Claire either to expand her practice, or to sell it and find the equivalent of full-time employment working in a hospital, a clinic, and/or in a physician's office. The parties stipulated that there had been no change in Christopher's earning capacity.[7]

Claire had claimed in response to Christopher's support motion that, apart from a shortage of business and employment opportunities, her earning capacity was limited by chronic, and increasingly severe, lower back pain. Christopher therefore requested she be required to undergo an independent medical examination. The court granted the request

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[7] At the conclusion of the hearing on November 8, the court ordered Christopher to amend his federal tax returns for 1998, 1999, and 2000 to no longer claim a deduction for the spousal support he paid to Claire during those years. Christopher filed a declaration with the court in 2002 stating the additional tax liability he would incur as a result of the amendments, plus a similar amendment for 2001, would total $113,905, plus interest.

but the examination had not yet taken place at the time of the November hearing, so the court precluded Claire from introducing any evidence in that regard at the hearing itself. The parties agreed at the hearing, however, to schedule an examination for December 13, 2001. The court continued the hearing; the examination took place as scheduled; and the resulting report was filed with the court on January 18, 2002. In March, June, and July, Claire filed various pleadings and documents challenging the report in certain respects, and submitting reports of her own. There then followed an extended period of posttrial briefing that was not completed until late in November of 2002.

Christopher's position, as stated in his opening posttrial brief, was essentially that his support obligation should be terminated because the evidence showed if Claire "had planned her career better, made the proper choices, the reasonable choices, she would have enjoyed income far in excess of what she has received both from her [practice] and from [Christopher]." Claire disputed this claim in her responsive brief. Christopher filed a reply, and declaration asserting he too had health problems.

The Court's Decision

The court issued a tentative decision on February 24, 2003, in which it proposed to reduce but not terminate Christopher's support obligation. It explained:

> "[Claire] has deliberately pursued a career path that will not support her and she has known that for years. The Court will therefore impute income to her commencing January 1, 2002. Based on the testimony [at the November 2002 hearing], the Court finds that [Claire] should be earning at least $35 per hour and working at least 35 hours per week for an annual gross of $63,700, or $5,308 per month. This amount will be imputed to her. [¶] … [¶]
>
> "The current spousal support order is $4,100 per month taxable to [Christopher] and non-taxable to [Claire]. The parties agreed to that in 1993. That part of the stipulated order has never been modified. Nonetheless, [Christopher] instructed his accountant to deduct spousal support on his income tax returns for 1998 and 1999. This resulted in both parties' tax returns being audited. [Claire] requests sanctions of $5,000 and reimbursement for the cost of the audit. The Court will deny sanctions but

will order [Christopher] to reimburse [Claire] for the costs incurred by her for the audit, to be determined according to cost bill.

"[Christopher] has made no showing that [Claire's] need decreased or that his income decreased for the years 1998, 1999, 2000 or 2001. The Court's *Gavron* warning gave [Claire] through March of 2001 to become fully self-supporting or have income imputed. Income will be imputed to [Claire] commencing January 1, 2002, as discussed above. The Court will also shift the tax burden to [Claire] on spousal support commencing January 1, 2002. It is not reasonable to require [Christopher] to pay income tax on [Claire's] support when he is in a higher tax bracket, whatever the level of support."

After discussing the parties' income and expenses in some detail, and finding that "[t]here is not enough money to cover everything at their current spending levels," the court concluded "an award of spousal support in the amount of $4,100 per month taxable to [Claire] fairly balances the hardship as required by Family Code §4320 (k)."

Christopher filed objections to the tentative decision, and Claire filed a response. The court overruled the objections and, on March 28, 2003, adopted the tentative decision as its statement of decision.

Judgment was entered accordingly on April 28, 2003 directing Christopher, among other things, to pay Claire $4,100 a month in spousal support, taxable to her beginning on January 1, 2002, and continuing until her death or remarriage, or until further order of the court. This appeal followed.

DISCUSSION

Christopher frames the issue before us this way:

"The issue presented by this appeal is that the trial court abused its discretion in ordering that spousal support would continue at the previous amount of $4,100 per month. If the trial court had applied relevant precedent and equitable standards to the facts as the court found them, support would have been substantially reduced, set at zero with a retention of jurisdiction, or would have been terminated. [Christopher] has no basic disagreement with the facts as determined by the trial court. [He] disagrees with the trial court's failure to follow precedent and fairness."

Before we get to precedent and fairness, we note two things that are conspicuously missing from Christopher's statement, and from his briefing in general. First, it is plainly incorrect, and misleading, to say the court continued spousal support at the same amount. In fact, the court modified the previous order to make the $4,100 taxable to Claire instead of taxable to Christopher. According to Christopher's own calculations, given his tax bracket, this effectively reduced the cost to him by about $1,400 a month, from $5,500 to $4,100. (And, of course, it also reduced the net income to Claire.)

Second, the court actually accepted the central premise of Christopher's motion, i.e., that support is not meant to maintain indefinitely the parties' circumstances existing at the time of separation. The court imputed income to Claire as if she were working to her full capacity; it reduced or disregarded some of her claimed expenses; and it found the marital standard of living was no longer determinative, or even particularly relevant, to the calculation of support. Nonetheless, given the parties' relative circumstances, and Claire's contributions to the community during a lengthy marriage, the court concluded it would be an abuse of discretion to terminate support or reduce it to zero.

Christopher's argument, then, is that the trial court should have disregarded these factors altogether in the interest of "fairness." Or, as he told the court at one point: "The real issue between the parties is philosophical. Chris Mills is motivated by money. Any person, no matter if male or female, always opposes paying alimony. Chris Mills' motivation and philosophy is accessible because it is typical. [¶] But Claire Mills' philosophy is oxymoronic. On one hand she seeks to be the independent liberated woman doing things her own way without the control of a man. But she also believes that it is her ***entitlement*** to have her lifestyle subsidized because she is a woman …."

Christopher bases his abuse of discretion argument largely on *Schaffer*, *supra*, 69 Cal.App.4th 801. The trial court in *Schaffer*, upon the dissolution of a 24-year marriage, ordered husband (Benson) to pay wife (Ida) $850 a month in spousal support for the first year, and $650 a month for the second year, followed by a "'jurisdictional step down'" in

support for the balance of Ida's life. (*Id.* at p. 803.) The order anticipated that Ida, who was then 48 years old and had just received a master's degree in counseling, would soon become self-supporting, although the trial judge expressed doubts about whether she was temperamentally suited for that sort of work. As it turned out she was not, and she had trouble finding and holding a job in her chosen field. However, she also was unwilling to work in any other field where jobs were available. Instead, over the next 15 years, she filed a series of successful motions to postpone the step-down provision of the preceding order -- in effect to extend support for another few years -- on the ground the unrealized expectation of employment since the last order was a change of circumstances. Finally, the last judge in the sequence decided "enough was enough," and refused to order more support. Ida appealed.

The appellate court affirmed. It held that a trial court, in ruling on a motion to modify spousal support, is not constrained by the "change of circumstances" rule from considering the supported party's conduct since the dissolution judgment (as opposed to his or her conduct only since the previous support order).

> "The standard rule that modifications in support orders may only be granted if there has been a material change of circumstances since the last order [citation] was designed to *prevent* repeated attempts to modify support orders without justification, not to circumvent the goal that supported spouses become self-supporting within a reasonable period of time. (See Fam. Code, § 4320, subd. (k) [now subd. (*l*)].) Yet that is precisely what has happened over the course of some 15 years in this case. Ida was able to extend her former husband Benson's obligation to pay spousal support for roughly six times as long as the original trial judge contemplated by not being able to find work in her chosen area whenever her last extension came due. True, at any given time it appeared she had a case for 'modification' based on the asserted failure of an 'expectation' that she would find a job in the applicable time period. [Citation.] Jobs in social work are hard to find and so it was possible to engage in a job search in the field with little danger of success. Each time she could credibly contend that the expectation of employment in the last order was 'unrealized.' [Citation.]

> "But, like a large impressionist painting you have to stand a good distance away from to fully appreciate, the big picture showed a marked reluctance on Ida's part to become genuinely self-supporting by pursuing employment more suited to her temperament. The trial judge here was perceptive enough to realize what was going on and call a halt to the indefinite extensions. He realized that Ida had frittered away ('wasted' was his precise word) at least 10 years during which she might have trained for alternative employment. And on top of that she *quit* the one job she did obtain in her chosen field and managed to lose another. The record thus fully supports the trial judge's decision and comes nowhere close to an abuse of discretion." (*Schaffer*, *supra*, 69 Cal.App.4th at pp. 803-804.)

The court went on to explain:

> "Family courts are courts of equity and there is a basic principle of equity that one cannot take advantage of one's own wrong. [Citations.] In this case, while it wasn't Ida's own 'wrong,' it was an unwise decision pursued against the express advice of [the original judge]. [Citation.] For the last judge] to have extended support one more time would only have been an act of 'enabling'—if not actually vindicating—Ida's reluctance to look for work in a more suitable field." (*Schaffer*, *supra*, 69 Cal.App.4th at p. 811.)

There are two readily apparent differences between *Schaffer* and the present case. First, *Schaffer* found no abuse of discretion by the trial court for terminating support in light of the supported spouse's unwillingness to seek or accept suitable work. The same is also true of many of the other decisions Christopher cites in support of his position, i.e., the appellate court upheld the lower court's exercise of discretion in denying a request by the supported spouse to increase or extend support. (See, e.g., *In re Marriage of Berland* (1989) 215 Cal.App.3d 1257, 1264 [failure to diligently pursue gainful employment]; *In re Marriage of McElwee* (1988) 197 Cal.App.3d 902, 910 [improvident management of assets]; *In re Marriage of Sheridan* (1983) 140 Cal.App.3d 742, 749 [failure to prepare for or seek gainful employment]; and distinguish *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 414 [abuse of discretion to extend support absent showing of changed circumstances]; *In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 240-242 [same];

In re Marriage of Beust (1994) 23 Cal.App.4th 24, 30-31 [distinguishing *Biderman* and *Aninger*].)

A determination that a trial court did not abuse its discretion by denying a motion for continued support is not, of course, the equivalent of a determination that it would have been an abuse of discretion for the court to grant the motion. This follows from the deferential standard of appellate review. We will reverse for an abuse of discretion only when, "'after calm and careful review of the entire record, it can fairly be said that no judge would reasonably make the same order under the same circumstances.' [Citation]." (*In re Marriage of Berland*, *supra*, 215 Cal.App.3d at pp. 1261-1262.) The area between an abuse of discretion for denying a motion and an abuse for granting the same motion is very broad indeed. (See *In re Marriage of Baker* (1992) 3 Cal.App.4th 491, 498 [given all the factors court must consider in making a support order, it rarely happens that court can properly exercise its discretion in only one way].)

This also follows from the other factor that distinguishes *Schaffer* from this case, i.e., the burden of proof. *Schaffer*, and the other cases cited by Christopher, concerned a motion by the *supported* spouse to continue support, whereas this case concerns a motion by the *supporting* spouse to terminate support. Unlike Ida Schaffer, it was not Claire's burden to show that support should continue, but Christopher's burden to show it should not.

The original support order in *Schaffer* included a "'jurisdictional step down.'" Such orders typically require the supporting spouse to pay a specified, and sometimes decreasing, amount of support for a fixed number of years (e.g., the time within which the supported spouse is expected to become self-sufficient), and thereafter to pay only a nominal amount (e.g., one dollar). This arrangement provides both an incentive for the supported spouse to seek out gainful employment, and a means by which the court can retain jurisdiction to continue support if the expectation of self-sufficiency turns out to have been unrealistic. (See Hogoboom & King, Cal. Practice Guide: Family Law (The

Rutter Group 2004) ¶¶ 6:1069-6:1070, p. 6-396 rev. #1, 2004.) Step-down orders put the burden on the *supported party* to seek a modification (e.g., an increase or extension) of support on the premise the unrealized expectation of self-sufficiency is a change of circumstances. (*In re Marriage of Aninger*, *supra*, 220 Cal.App.3d at p. 240.)[8]

In the present case, by contrast, the 1993 support order, which was based on a stipulation by the parties, provided that neither the amount nor duration of support order No. 1 (directing Christopher to pay Claire $4,100 a month) could be modified for five years (ending in June of 1997), and could be modified thereafter only upon a properly-noticed motion and a showing of changed circumstances. Hence, the order here was the converse of the one in *Schaffer*. It presumed support would continue indefinitely, and placed the burden on the *supporting party* (Christopher) to demonstrate to the court why it should not.

Although the court, in its 2000 order denying Christopher's motion to terminate support, put Claire on notice it "will consider imputing to her the usual earnings of a nurse practitioner in this area if she does not become fully self-supporting by [2003]," and thus arguably shifted the burden to her to show why income should *not* be imputed (see *In re Marriage of Gavron*, *supra*, 203 Cal.App.3d at pp. 711-712), it did not shift the burden to Claire to show why her support should not be *terminated* in 2003.

The court did in fact do what it said it might; it imputed income to Claire as if she were working to her capacity. But it also continued support, albeit in a reduced amount,

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8 A variation of a step-down order is known as a "*Richmond* order," after *In re Marriage of Richmond* (1980) 105 Cal.App.3d 352. A *Richmond* order provides that spousal support jurisdiction will terminate on a specified date unless, prior to that date, the supported spouse files a motion establishing good cause to extend it. (*In re Marriage of Berland*, *supra*, 215 Cal.App.3d at p. 1261, fn. 1; Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:1031, p. 6-370, rev. #1, 2004.)

in recognition of the fact she still was not fully self-supporting (and might never be), and Christopher had the ability to pay support. In this respect, the situation here is somewhat like the one in *In re Marriage of Berland*, *supra*, 215 Cal.App.3d 1257. In that case, following dissolution of a lengthy marriage, the trial court directed husband (Allan) to pay $3,200 a month in spousal support to wife (Ronna) for 30 months, at which time it would be reduced to $1 a month unless Ronna was able to show, in a motion to modify support, that she had made a diligent effort to obtain suitable employment. Ronna tried unsuccessfully during the first half of the 30-month period to earn a living in her chosen field (philanthropic fundraising), despite a warning from the trial judge she was likely to fail, before switching to another field (real estate sales) where she obtained better results. Shortly before the end of the 30-month period, Ronna filed a motion to modify (extend) support. The court granted the motion and continued support for 16 more months, but reduced the amount to $1,800 a month upon finding that Ronna's initial choice to seek fundraising work had been ill-advised. Ronna challenged the reduction on appeal.

The appellate court affirmed the order. It noted the trial court, given Ronna's lack of diligence, would have been justified in terminating support altogether. The court then went on to say: "It was up to the trial court in the exercise of its discretion to determine whether Allan should be financially responsible in any way for Ronna's failure to pursue financial independence with reasonable diligence. Under these facts, the trial court's determination of the relative equities was well within its discretion." (*In re Marriage of Berland*, *supra*, 215 Cal.App.3d at p. 1264.) The court summarized its conclusion this way.

> "If the court finds that there was a failure to exercise reasonable diligence to become self-supporting, but that even if reasonable diligence has [*sic*, had?] been exercised the supported spouse would still not have become fully self-supporting, the court possesses the discretion to extend the duration of the order and to fix the support in the amount the supported spouse would have required if reasonable diligence had been exercised." (*Id.* at pp. 1260-1261.)

This is essentially what happened in the present case. The court determined that Claire, even if she were working to her capacity, still would not be fully self-supporting, and thus that Christopher should continue to contribute to her support. Given his superior earning capacity, the length of their marriage, and Claire's contribution to Christopher's medical practice, the court acted well within its discretion.

> "An award [of spousal support] that affords the supporting party a significantly higher standard of living than the other, forcing the supported party into a standard of living significantly lower than was accustomed during the marriage, is an abuse of discretion … particularly where the marriage is of 'lengthy' duration, the supporting party's earning capacity is unimpaired, and the supported party faces an uncertain economic future." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 6:953, p. 6-346.3, rev. #1, 2003, citing *In re Marriage of Beust*, *supra*, 23 Cal.App.4th at p. 30; *In Re Marriage of Ramer* (1986) 187 Cal.App.3d 263, 273; and *In re Marriage of Andreen* (1978) 76 Cal.App.3d 667, 671-672.)

DISPOSITION

The judgment is affirmed. Costs are awarded to respondent.

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Buckley, J.

WE CONCUR:

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Dibiaso, Acting P.J.

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Cornell, J.